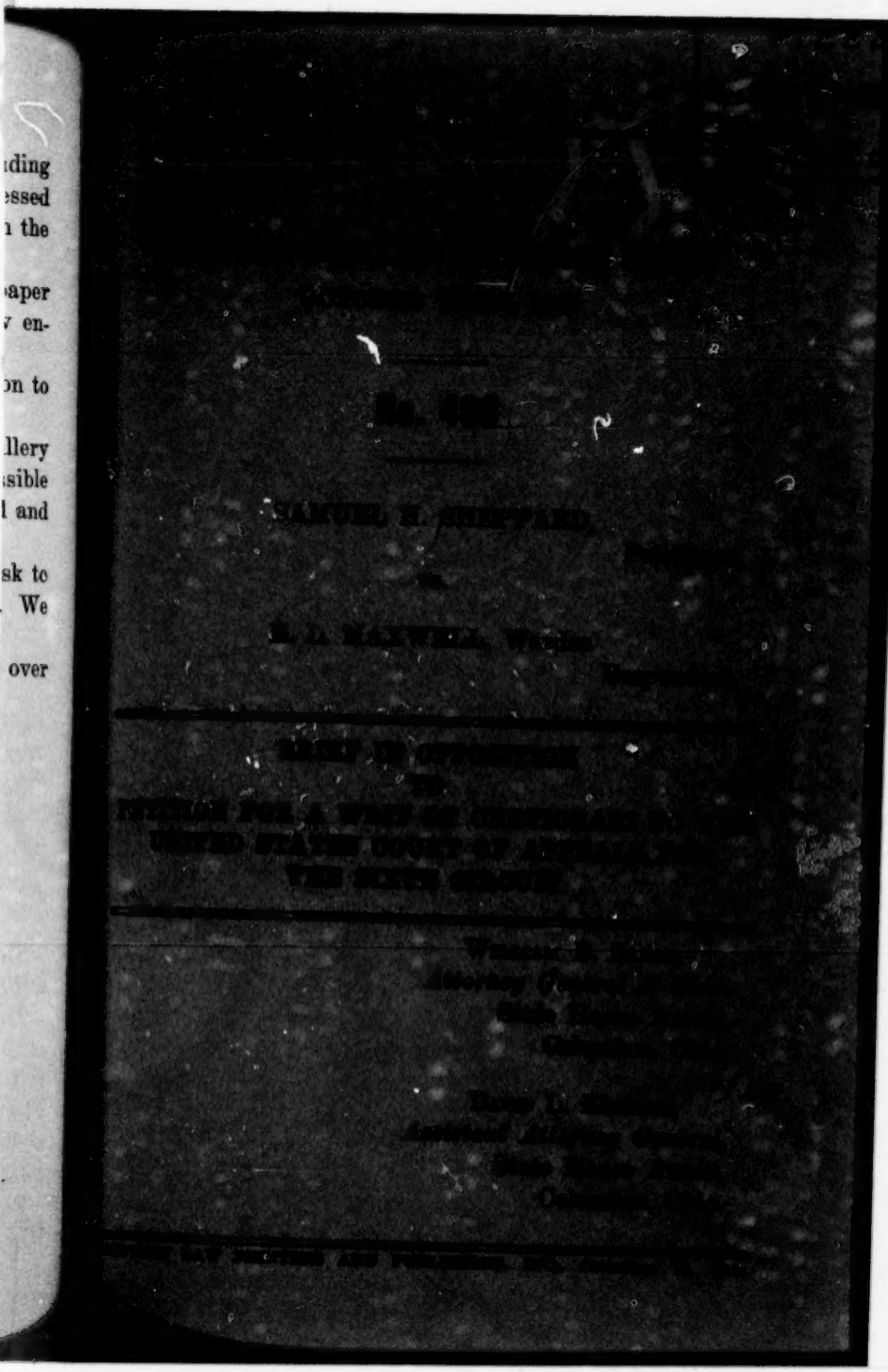

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 490

SAMUEL H. SHEPPARD,

Petitioner,

vs.

E. L. MAXWELL, Warden,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

The United States Court of Appeals for the Sixth Circuit has set out in its opinion such a direct, concise and accurate statement of the case that respondent does not feel it necesary to attempt to improve upon it. Therefore, for its Statement of the Case, respondent sets forth below the statement of the case made by the Court of Appeals.

"Appellant, Warden of the Ohio State Penitentiary, appeals from a United States District Court order declaring void the 1954 conviction of petitioner, Dr. Samuel H. Sheppard. Judgment had been entered in the Court of Common Pleas of Cuyahoga County, Ohio, upon a jury verdict convicting Sheppard of the second-

degree murder of his wife.[1] Upon his appraisal of trial and pretrial publicity and other matters, the District Judge concluded that Dr. Sheppard did not have a fair trial and was thus deprived of rights guaranteed him by the United States Constitution. His order granted bail to Dr. Sheppard and released him from the Ohio Penitentiary where he had been confined under a life sentence since his conviction in 1954. Ohio was granted 60 days within which to take further action against Dr. Sheppard. *Sheppard v. Maxwell*, 231 F. Supp. 37 (July 15, 1964). This Court has stayed the order fixing such time limitation.

"Sheppard's conviction and the denial of his motion for new trial on grounds of newly discovered evidence were both affirmed on appeal by the Court of Appeals for Cuyahoga County, Ohio. *State v. Sheppard*, 100 Ohio App. 345, 128 NE (2) 471 (1955); *State v. Sheppard*, 100 Ohio App. 399, 128 NE (2) 504 (1955). The Ohio Supreme Court dismissed an appeal from the decision affirming the denial of a new trial in *State v. Sheppard*, 164 Ohio St. 428, 131 NE (2) 837 (1956), and affirmed the conviction in *State v. Sheppard*, 165 Ohio St. 293, 135 NE (2) 340 (1956), two judges dissenting. Application for certiorari was denied by the United States Supreme Court, *Sheppard v. Ohio*, 352 U.S. 910, 1 L. Ed. (2) 119 (1956), and rehearing was denied, *Sheppard v. Ohio*, 352 U.S. 955, 1 L. Ed. (2) 245 (1956). Dr. Sheppard's later petition to the Supreme Court of Ohio for a writ of habeas corpus was denied, *State, ex. rel. Sheppard v. Alvis*, 170 Ohio St. 551, 167 NE (2) 94 (1960). Dr. Sheppard thus has had the benefit of all the processes of law provided by the State of Ohio, and

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[1] Marilyn Sheppard, petitioner's pregnant young wife, was bludgeoned to death in the bedroom of her lakeshore home during the early morning hours of July 4, 1954. Dr. Sheppard told police that he had been wakened from his sleep on a couch in the downstairs living room by a noise or cry from upstairs, ascended the stairs, and was knocked unconscious while grappling with an unidentifiable white "form" standing next to his wife's bed. He further stated that upon recovering, he pursued the form out of the house, to be again knocked out while struggling on the shore. The evidence disclosed that Dr. Sheppard had recently been unfaithful to his wife.

the United States Supreme Court did not see fit to take the case for its review.

"The habeas corpus proceeding here involved was commenced in the United States District Court April 11, 1963, charging, as amended, some 23 separate constitutional defects in Sheppard's conviction. Some of these had already been found without merit by the Ohio Courts and others were new. Indicating his view that there were probably other constitutional imperfections in Dr. Sheppard's trial, the District Judge bottomed his decision on four separate grounds, (1) newspaper publicity before and during the trial denied Sheppard a fair trial, (2) the trial judge should have disqualified himself, (3) evidence that Sheppard had refused to take a lie detector test and that another witness had taken such a test was improperly brought before the jury, and (4) the bailiffs in charge of the jury after the cause was submitted to it improperly allowed individual jurors to make telephone calls to their families. Grounds 1 and 4 were passed upon in the Ohio Court of Appeals and Supreme Court and were found to be without merit. They were also relied upon in the application to the United States Supreme Court for certiorari, which was supported by the same volumes of newspaper publicity as are before us. Ground 2 and part of ground 3 were first asserted in the instant petition for habeas corpus." (Rs. 1-3)

The United States Court of Appeals for the Sixth Circuit felt that the release of petitioner was improvident and therefore vacated the order of the District Court and remanded petitioner to the custody of the respondent Warden of the Ohio Penitentiary, Columbus, Ohio, on May 5, 1965. Petitioner filed a motion for rehearing *en banc* on June 11, 1965 and a petition for rehearing on the same day. Both the motion for rehearing *en banc* and the petition for rehearing were denied on July 14, 1965 with one judge dissenting. (Rs. 111-113) On July 26, 1965, the Court of Appeals entered an order staying the mandate and petitioner's petition for writ of certiorari was filed herein on August 24, 1965.

SUMMARY OF ARGUMENT

Petitioner has presented four "reasons" why the Court should grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review eleven Questions Presented in his petition. All but three of the Questions Presented were issues considered by both courts below. The last three Questions Presented are issues concerning the sufficiency of the Court of Appeals' review of this case. These last three issues have been fabricated out of the petitioner's own mind because in them he clearly mistakes the true holding of the Court of Appeals. Not only do these last three questions miss the point made by the Court of Appeals, if the holding they presume did in fact exist, petitioner would still have failed to present "special and important reasons" why the Court should grant certiorari as required by its Rule 19. Furthermore, the other Questions Presented were considered and decided as issues before both courts below. Petitioner fails to state wherein there lies and in what particulars there exist "special and important reasons" of the character set forth in Rule 19 why the court should grant certiorari. Petitioner fails to do this because there do not exist "special and important reasons" for granting certiorari.

The crucial difference between the decisions of the two courts below, although not the only difference, is in their view of the facts constituting the circumstances which surrounded the Sheppard trial. The District Court viewed them as such untoward circumstances as to justify a presumption of prejudice while the Court of Appeals held them to be strictly liable to the general rule requiring a showing of identifiable prejudice before the constitutional infirmity may vitiate the conviction of an accused. In essence, respondent contends that the petitioner has failed to present

"special and important reasons" why certiorari should be granted because such reasons simply do not exist. Further, respondent contends that the special facts of the Sheppard trial are far from being of a character which this Court has previously found to be inherently suspect and thereby susceptible of a presumption of prejudice. Petitioner has not sustained his burden of showing some identifiable prejudice which would support a finding that his trial and conviction was void. The petition for a writ of certiorari should be denied.

ARGUMENT

I. Introduction: PETITIONER HAS BEEN ACCORDED MORE THAN A FULL AND FAIR REVIEW OF THE CONSTITUTIONALITY OF HIS TRIAL.

Respondent strongly urges that this Court should not grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit for the reasons that (1) petitioner has not *presented* any "special and important reasons" [1] for which the Court should grant certiorari and (2) there do not *exist* any "special and important reasons" for which the Court should grant certiorari. Respondent's argument will be confined to these two reasons in opposition to the granting of the writ. Review or argument of the merits is herein unnecessary, indeed inappropriate, except insofar as is necessary to clearly illumine the lack of "special and important reasons" in this case for the granting of the writ.[2]

Although petitioner claims a number of violations of his constitutional rights, the fundamental issue presented (Ra 403a) and most intensively briefed and argued to the courts below as well as to the courts of Ohio is the question of whether or not the publicity before and during the trial of petitioner so enveloped and pervaded the trial proceedings as to prejudicially influence the judge, jury, and prosecution, thereby denying petitioner his constitutional right to a fair trial in accordance with fundamental due process requirements of the Fourteenth Amendment to the Constitution of the United States.[3] It is this question, along with

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[1] Rule 19 (1), Rules of the Supreme Court of the United States.

[2] For the sake of uniformity and convenience to the Court, respondent will adopt the method of reference to the trial transcript, record, and opinions below, used by the petitioner and set forth in the petition for certiorari at page two, footnote one thereof. Reference to the Petition for Writ of Certiorari will be made by reference to the appropriate page number preceded by the abbreviation "Pet."

[3] Petitioner's Questions Presented numbers 1. through 5. and argued in part I of petitioner's Argument.

the other of petitioner's Questions Presented, except for those numbered six, nine, ten, and eleven (Pet. 2 & 3),[4] which petitioner previously presented to this Court during the October Term, 1956[5] in a petition for writ of certiorari to the Supreme Court of Ohio to consider the latter's review on appeal. That petition for certiorari was denied. *Sheppard v. Ohio,* 352 U.S. 910, 1 L. Ed. 2d 119, 77 S. Ct. 118 (1956); rehearing denied 352 U.S. 955, 1 L. Ed. 2d 245, S. Ct. 323 (1956).

Respondent is fully aware that denial of a petition for writ of certiorari in no way implies consideration of or an opinion on the merits of the case. However, as has been pointed out by the Court frequently and specifically by Mr. Justice Frankfurter in his memorandum filed with the denial of certiorari in *Sheppard v. Ohio, supra,* 910, denial of a petition for writ of certiorari does mean ". . . that for one reason or another this case did not commend itself to at least four members of the Court as falling within those considerations which should lead this Court to exercise its discretion in reviewing a lower court's decision." Respondent further realizes that he is referring to a denial of certiorari by this Court almost ten years ago. Had the passage of time between then and now so altered the circumstances surrounding the trial and the questions presented by the current petition for certiorari, or had the law applicable to the merits of the case not been illumined by decisions of this Court and/or had it changed during these ten years, *Sheppard v. Ohio, supra,* would be totally immaterial to the present application. This, however, is not so and the Court of Appeals recognized this when it said: "The main points

[4] Assertions, statements of fact, and arguments contained in this introductory discussion are not intended at this point to refer to these new questions. They will be discussed at a later point in this brief.

[5] Case No. 352.

earnestly pressed upon the District Judge and this Court are not the belated discovery of Dr. Sheppard's present counsel." (Rs. 8) Circumstances surrounding the trial and the questions now presented obviously have not changed one iota. Neither has there been presented any new, different, or additional facts which would alter the implications of these circumstances *except* for the fact that after ten years the circumstances are not fresh at hand and are easily enlarged out of proportion to their actual significance. In fact, the copies of newspaper articles and pictures of the courtroom included in the appendix to the petition now before the Court are the exact same selections of newspaper articles and pictures which appeared in the appendix to the petition for certiorari before the Court during its October Term, 1956.

Further, in 1956, along with the other claims of constitutional violations previously noted, "The defendant claimed that a proceeding so infused and enveloped by the 'atmosphere of a "Roman Holiday" ' precluded a fair trial and could not but deprive him of the due process of law guaranteed by the Fourteenth Amendment of the Constitution." *Sheppard v. Ohio, supra*, 910. All of the claimed violations of his constitutional rights the petitioner now urges upon the Court with the exception of alleged lack of impartiality of the trial judge (Questions Presented 6, pet. 2) and the alleged failure of the Court of Appeals to adequately and properly review the decision of the District Court (Questions Presented 9, 10, 11, Pet. 3), were presented to the Court in 1956.

The law applicable to these questions has not changed nor has the application of that law by other decisions of this Court so altered the significance of the special facts in this case as to provide "special and important reasons" for which certiorari should be granted. The latter proposition

is argued more fully in part II B. of Respondent's Argument. Suffice it to say here that the basic reason the Court of Appeals reversed the decision of the District Court is that the District Court improperly applied the law relevant to the merits of the case. That law consists of a rule announced in *Stroble v. California*, 343 U.S. 181, 96 L. Ed. 872, 72 S. Ct. 599 (1952) requiring the petitioner to maintain his burden of proof by a showing of identifiable prejudice which denied him a fair trial and an exception to that rule announced in *In Re Murchison*, 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955) under which, because of the untoward circumstances presented, prejudice will be presumed without such a showing. Both of these cases were decided *before* petitioner presented his petition for certiorari in *Sheppard v. Ohio, supra.*

The character of "special and important reasons" for which the Court will grant certiorari are the same now as they were in 1956. The passage of time has not altered the facts and circumstances, evidence, the questions presented, or the law applicable to the merits. Nevertheless, without setting forth any "special and important reasons", despite the fact that none exist, and despite the fact that not even four members of the Court in 1956 could find such in relation to most of his present claims, petitioner still continues to seek review of a case which has been before every state and federal court with jurisdiction over the subject matter at least once and often two or three times. Respondent maintains that petitioner has had more than a full and fair review of his trial and that the litigation which has continued almost without abatement for over ten years should now come to an end with a denial of the present petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

II. PETITIONER HAS NOT *PRESENTED* AND THERE DO NOT *EXIST* ANY "SPECIAL AND IMPORTANT REASONS" WHY THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT TO REVIEW QUESTIONS PRESENTED BY THE PETITIONER.

A. PETITIONER HAS FAILED TO *PRESENT* ANY "SPECIAL AND IMPORTANT REASONS" WHY A WRIT OF CERTIORARI SHOULD BE GRANTED TO REVIEW HIS QUESTIONS PRESENTED.

(1) "1. *Did the pre-trial publicity in petitioner's case so prejudice the community that no fair and impartial jury could have been impanelled?*

"2. *Did the trial judge fail to adequately protect the petit-jury, once impanelled, from prejudicial extrinsic influence?*

"3. *Did the trial judge fail to adequately interrogate the jurors when they had been exposed to prejudicial extrinsic matter through the news media during trial?*

"4. *Did the trial judge fail to maintain constitutionally adequate decorum in the courtroom during trial?*

"5. *Did the trial judge deny petitioner a public trial by assigning nearly all of the seats in the courtroom to newsmen?*

"6. *Did the trial judge, in the special circumstances of this case, violate petitioner's constitutional right to a fair and impartial judge by failing to recuse himself despite his firm belief,*

undisclosed to petitioner, that petitioner was 'guilty as hell' and that the case against him was 'open and shut'?

"7. Did the trial judge violate petitioner's federal constitutional right against self-incrimination by receiving evidence that petitioner had refused to take a lie detector test and truth serum?

"8. Did the action of the bailiffs who permitted jurors to telephone outsiders during the course of deliberations in violation of Ohio Law violate petitioner's federal constitutional right to a fair and impartial trial?"

In relation to the above questions,[6] petitioner has failed to present any "special and important reasons" for the granting of the writ.[7] Paragraph one of Rule 19, Rules of the Supreme Court of the United States provides that "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." The same

[6] Argued in parts I through IV of petitioner's Argument (Pet. 14-35)

[7] Petitioner outlines his argument on page 14 of the petition stating there that "We will deal first with those questions confronted by the District Court and the Court of Appeals; [parts I through IV of petitioner's argument] second with those alleged constitutional violations noted but not considered by the District judge and summarily rejected by the Court of Appeals; [part V of the petitioner's argument] and third with *failure of review described above.*" Respondent interprets the italicized portion to relate to the third "reason", the later appearing in the paragraph immediately preceding the italicized portion. By process of elimination, the third "reason" must then have reference to the remaining parts VI and VII of petitioner's argument. (Note also that petitioner's petition for rehearing in the Court of Appeals, Part V is similarly entitled at page 45 thereof "Total Failure of Review: The Sufficiency of the Evidence.") However, since Part V also deals with this matter of proper review, Respondent includes Part V as though referred to by the third "reason."

rule continues in subparagraphs (a) and (b) to indicate the kind of "special and important reasons" for which the Court will grant the issuance of the writ. Subparagraph (a) dealing with review of state court decisions is inapplicable here. Subparagraph (b) pertains to a review of decisions of the federal courts of appeal. Further, paragraph 1. (b), Rule 23, Rules of the Supreme Court of the United States, directs that the petition for writ of certiorari contain "A direct and concise argument amplifying the *reasons* relied on for the allowance of the writ. See Rule 19." (Emphasis added) Petitioner has failed to present any "special and important reasons" in his argument for the granting of a writ of certiorari. The petitioner's reasons for granting the writ are as follows:

> ". . . this trial was . . . a 'mockery of justice' and ought not to be allowed to permanently stain the record of American jurisprudence.
>
> ". . . there are numerous individual violations of the federal constitution which cannot now be vindicated without action by this Court.
>
> ". . . the reviewing process in the Court of Appeals fell far short of that required by current habeas corpus decisions of this Court; . . .
>
> ". . . the conduct of prosecuting officials and newsmen which the Court of Appeals now condones was so flagrant and abusive that the stamp of approval they now enjoy should be eradicated." (Pet. 14)

Comparing the first, second, and fourth of the above "reasons" with the character of reasons set forth in paragraph 1. (b), Rule 19, governing review on certiorari, it becomes obvious that petitioner does not claim in these three "reasons" that the decision of the Court of Appeals (1) is in conflict with the decisions of other courts of appeal on the same matter, or (2) that it presents a conflict with applicable state or territorial law, or (3) that it has decided

a question of importance not heretofore decided by this Court, or (4) that it has decided the federal questions presented in a way which conflicts with applicable decisions of this Court, or (5) that it so far departs from the accepted judicial procedure as to call upon this Court's power of supervision over the lower federal courts. The first, second, and fourth "reasons" given by the petitioner suggest that petitioner is merely attempting to gain another opportunity to argue the merits of this case before the Court without any "special and important reasons" for doing so. That this is true is evidenced by petitioner's Argument.

That Argument consists entirely of a discussion of the merits of the questions already given full and fair adjudication in the Courts below and fails to present a "direct and concise argument amplifying the reasons relied on for the allowance of the writ" in conformity with Rule 19, Rules of the Supreme Court of the United States. A quick review of petitioner's Argument, parts I through IV, will readily indicate his failure to cite compelling reasons for granting the writ. Parts V through VII will be discussed in more detail later.

"I. THE PUBLICITY AND CONTROL OF THE COURT-ROOM AND JURY"

"A. *The Pretrial Publicity*" (Pet. 14-19)

Following an argument of the merits and review of the newspaper publicity petitioner concludes with:

> "The District Court had adequately set forth enough of the publicity before trial to warrant a conclusion that the Cleveland community was in no condition to furnish a jury sufficiently impartial to reach minimum standards of due process. Additional material contained in the green scrapbooks reinforces this position very soundly. We submit that the Court of Appeals was in error in rejecting as clearly erroneous the District

> Judge's finding of fact, and that examination of the matter by this Court warrants granting the writ." (Pet. 19)

Petitioner has said nothing other than to reiterate the conclusion of the District Court, submit that he agrees therewith, and that he thinks the Court of Appeals was wrong. Petitioner does not give the slightest hint of the particulars in which he considers the Court of Appeals erred and which errors are of a character sufficient in importance to be reviewed by this Court. Petitioner obviously does not comprehend just what prompted the Court of Appeals to reverse the District Court, a point which will be discussed in part II. B. of respondent's Argument.

"B. *Publicity During the Trial*" (Pet. 19-26)

Again, after argument of the merits and a review of the Court's decision in *Estes v. Texas*, ... U.S. ..... (1965) 33 U.S.L. Week 4543 (June 7, 1965) in regard to those merits, petitioner simply states:

> "We do not repeat those instances [alleged violations of constitutional rights] here, but we respectfully suggest that they show beyond question that the trial court's handling of the entire matter was woefully inadequate, and operated to deprive petitioner of a fair trial."

Again, as pointed out in relation to petitioner's Argument I.A. above, there is no indication here that petitioner urges that the Court of Appeal's decision conflicted with decisions of other courts of appeal, that its decision is not in conformity with the decisions of this Court, or is in any other way not in accordance with accepted law and procedure applicable.

Without belaboring the point and since a reading of the petition for certiorari by the Court will readily disclose that the other of petitioner's Arguments are infected with

the same vice, respondent simply reiterates that petitioner has failed to *present* any "special and important reasons" why the Court should grant certiorari.

The third of the above listed "reasons" of petitioner relates to his Questions Presented numbers nine, ten, and eleven. (Pet. 3) [8] Respondent will argue, in numerical order, the failure of the petitioner to present "special and important reasons" why the Court should review on certiorari these questions.

(2) "9. *Did the court below deprive petitioner of proper review of other claimed constitutional violations?*" [9]

The District Court indicated clearly (Ra. 404a & 476a) that its decision was based upon a consideration of only part of the twenty-three stipulated issues. (Ra. 398a-401a) Respondent appealed the decision of the District Court basing its argument upon the erroneous finding of facts and conclusions of law made by the District Court in relation to those stipulated issues considered by that Court. Petitioner was obviously apprised of this fact by respondent's brief in the Court of Appeals and admitted the knowledge thereof in his own brief in that Court.[10] Yet, petitioner did not argue the other claimed constitutional violations in his brief before the Court of Appeals, but stated therein ". . . that to the extent these additional issues may be entitled to *some* consideration, we will stand upon the argument addressed to them in the Brief for Petitioner in the District Court (R[a] 151-237a, 300-352a)." [11] (Emphasis added)

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[8] See footnote 7, *infra*.

[9] Argued in part V of petitioner's Argument, (Pet. 35).

[10] Brief of Petitioner-Appellee in the Court of Appeals for the Sixth Circuit, Case No. 16077, page 9.

[11] *Id.* at 10.

Respondent wishes to point out that all of the stipulated issues before, but not considered by, the District Court[12] with the exception of stiplated issues numbered 18, 19, and 21 (Ra. 400a) were before the District Court on a stipulated set of facts contained in Pre-Trial Order No. 4 (Ra. 150a (6). Although petitioner had the opportunity (Ra. 150a (16), he did not subsequently present any evidence to substantiate the latter three issues and should not now be heard to say that he was deprived of a proper review thereon in the court below.

A reading of the two briefs submitted by petitioner to the District Court (Ra. 151a & 300a) shows clearly that petitioner evidently did not consider stipulated issues 18, 19, and 21 important because, although he would stand upon his argument of them in his briefs to the District Court, those briefs contain no argument addressed thereto.

Although petitioner now feels that he was denied due process of law, because he claims the Court of Appeals did not *adequately* consider these issues, he evidently did not think the *total failure* of the District Court *to consider them at all* a sufficient denial of due process of law to even assign such failure to consider them, as error in a cross-appeal. Having failed to do so the petitioner now desires this Court to review on certiorari an *alleged* error in the Court of Appeals which, when committed in a larger magnitude by the District Court deciding in petitioner's favor, was not even pressed by him in the Court of Appeals. Petitioner was of the opinion, that the Court of Appeals could, if it disagreed with the District Court decision, either remand or decide itself the issues not considered by the District Court.[13] Upon a stipulated set of facts the Court of

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[12] Stipulated issues numbered 1, 9, 11, 12, 17, 18, 19, 20, and 21., (Ra. 404a)

[13] Brief of Petitioner-Appellee in the Court of Appeals for the Sixth Circuit, Case No. 16,077, pages 9 & 10.

Appeals considered the stipulated issues not considered by the District Court. The Court of Appeals took this case under consideration after oral argument on the 9th day of October, 1964 and rendered its decision consisting of some 80 pages on the 5th day of May, 1965. In that decision the Court of Appeals stated ". . . we consider that the case made in the District Court is before us and we have considered and found without merit the other claims of constitutional vice in the judgment convicting Dr. Sheppard." (Rs. 57) And, as the dissenting judge remarked, "My brothers, . . . have written a careful and scholarly opinion." (Rs. 92)

For the petitioner to say, after seven months consideration of this case by the Court of Appeals, after that Court stated it did consider *all* the issues, after the petitioner himself did not press consideration of all the issues upon that Court, is for him to unnecessarily impugn the sincerity and conscientiousness of the Court of Appeals. The Court of Appeals *did* consider *all* the issues. But after asserting that they did not do so adequately, petitioner cites not that first instance which even hints at substantiating his claim or in what particulars the Court of Appeals denied him a full and fair review, except for the fact that they did not write at length in their opinion concerning the issues not considered by the District Court.

Respondent is sure that the Court will agree when he says that petitioner's third "reason" (Pet. 14) relating to this Question Presented amounts to no reason at all and that petitioner has failed to present anything in the nature of "special and important reasons" for which the Court will grant certiorari, let alone an error of such magnitude as to constitute a denial of due process.

(3) "10. *Did the court below improperly foreclose without litigation the question of the sufficiency of the evidence?*" [14]

As noted before, petitioner's second "reason" (Pet. 14) relates to this question as a reason why the Court should grant certiorari to review it.[15] The District Court refused to consider (Ra. 403a) stipulated issue number 19 (Ra. 400a) which questioned whether or not the Supreme Court of Ohio correctly determined upon appeal that the evidence introduced at trial was sufficient to sustain a conviction. Although the District Court did not consider the issue, neither did it or the Court of Appeals "foreclose without litigation the question of the sufficiency of the evidence." As noted in respondent's previous argument II. A. (2), *petitioner* did not argue this issue in his brief (Ra. 151a & 300a) filed in the District Court. He further waived oral argument in that court. (Ra. 295a) It was an "additional issue" [16] which was "brought to this Court's [Court of Appeals] attention" [17] but not argued. As he did in relation to his Questions Presented number 9. (Pet. 3), discussed above, petitioner attempts to assign error to the proceedings of the Court of Appeals for a situation for which petitioner himself is responsible. Further, and more important, it simply is not true that the court below foreclosed litigation of the sufficiency of the evidence. But on the contrary considered, decided, and discussed the issue in its opinion. (Rs. 57-58) Petitioner "simply [did not] press it at [that] time." (Rs. 58)

Respondent emphasizes that petitioner's argument of this Question Presented *does not contend* that the Court of Ap-

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[14] Argued in part VI of petitioner's Argument, (Pet. 35).

[15] See footnote 7 *infra*.

[16] Brief of Petitioner-Appellee in the Court of Appeals for the Sixth Circuit, Case No. 16,077, page 10.

[17] *Ibid.*

peals' decision that ". . . Dr. Sheppard's conviction is not 'so totally devoid of evidentiary support' as to constitute a denial of due process," (Rs. 58) was incorrect [18] or that it presented a conflict with decisions of other courts of appeal on the same matter or that it is incompatible with the applicable decisions of this Court or that any other "special and important reason" is thereby presented which would call for the Court to grant certiorari. He does not even now ask the Court to review the trial transcript to determine for itself that the evidence was constitutionally insufficient to convict petitioner. (Pet. 41) What petitioner does desire, however, is that not he, but the federal courts "litigate" the question of sufficiency of evidence, and, because they did not "litigate" it, claims that therein lies "special and important reasons" why this Court should grant certiorari. Petitioner fails to realize that it is not the duty of the federal courts to litigate the issue but to consider and decide the question presented upon the evidence and argument offered. In *Rice v. Sioux City Cemetery,* 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614 (1954), Mr. Justice Frankfurter, speaking for the Court, made clear at page 74 that ". . . this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. *Magnum Import Co. v. Coty,* 262 U.S. 159, 163; . . . ." and at page 79 of the same case ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties. . . ."

This Question Presented by the petitioner is but another example of his continuing effort to get some court, some-

[18] Court of Appeals cited in support hereof the following cases: "*Garner v. Louisiana,* 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville,* 362 U.S. 199 (1960); and *Hall v. Crouse,* 339 F. (2) 316, (CA 10, 1964)."

where, to say that he is not guilty of the crime with which he was charged. He "... contends that someone, somewhere, ought to be required to show proof of his crime which satisfied minimum requirements of due process." (Pet. 42) Petitioner has neither presented nor does there exist any error below with respect to the review of this issue and petitioner has neither presented nor do there exist any "special and important reasons" for granting the writ to review this question.

(4) "11. *Did the court below erroneously rule that no combination of individual errors, none of which rises to the stature of a federal constitutional violation, can in the aggregate show that the state court trial fell short of the requirements of due process of law?*" [19]

Not only did the court below not *erroneously* rule as stated by petitioner but it did not even *make* such a ruling. Petitioner mistakes the holding of the Court of Appeals. The District Court, although holding that each of the claimed constitutional violations, i.e. prejudicial pre-trial and trial publicity, alleged bias of the trial judge, alleged prejudicial communications with jurors during deliberation, and improper admission of evidence of petitioner's refusal to take a lie detector test, denied petitioner his right to a fair trial under the due process requirement of the Fourteenth Amendment to the Constitution of the United States, stated that when all five of these violations were cumulated, the trial became a "mockery of justice." (Ra. 475a)

In reviewing the latter proposition of the District Court, the Court of Appeals held:

"We have rejected the claims based on publicity, alleged bias of the trial judge, and communications

[19] Argued in part VII, petitioner's Argument, (Pet 42).

with the jurors because *no showing* has been made that anything improper *in fact* occurred; we are no more willing to *presume* infirmity when these claims and the matter of the lie detector evidence are listed together than when they are considered separately." (Rs. 56, Emphasis Added)

The Court of Appeals did *not* hold that had petitioner's claims been substantiated by facts, they *could not* have found in the cumulative effect a denial of petitioner's constitutional right to a fair trial. They simply held that petitioner failed to present to the court such special facts as to cause the Court of Appeals to *presume* prejudice of constitutional dimension without a *showing* of *identifiable prejudice*. That this is the correct interpretation of the holding of the Court of Appeals is further substantiated by the statement that court made in concluding its opinion, as follows:

"The *facts* of this case do not add up to any of the situations in which the Supreme Court of the United States or any United States Court of Appeals has found it appropriate to strike down a judgment affirmed by the highest court of a state." (Rs. 59, Emphasis Added)

A detailed discussion of just what the Court of Appeals held in reversing the District Court and a clear showing that their holding is in strict conformity with applicable decisions of this Court is contained in Respondent's Argument, II. B. and will not be discussed at length here. Respondent agrees with petitioner when the latter states: "Nor can it be [redacted]hat the combination of intrusions upon *a* defendant's rights *can never* be more grave than any of the parts." (Pet. 42) However, the Court of Appeals in this case has not so held. Had the court found constitutional infirmity in petitioner's trial due to the cumulative effect of the facts of the case, it would have been inconsistent with

their holding upon the major points of the District Court's decision. Had the Court of Appeals done so, they would, in effect, have said that although there is no evidence to show identifiable prejudice denying the petitioner his right to a fair trial, we will presume, because petitioner has so claimed, that the cumulation of his *claims* are such as to have denied him a fair trial.

Consequently, the third "special and important reason" given by petitioner for granting certiorari (Pet. 14) is totally unfounded in relation to petitioner's Question Presented here discussed. Petitioner has again failed to set forth any such reason for the granting of a writ of certiorari.

B. THERE DO NOT *EXIST* ANY "SPECIAL AND IMPORTANT REASONS" WHY THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO REVIEW PETITIONER'S QUESTIONS PRESENTED.

Respondent has shown in the foregoing part II.A. of his Argument that petitioner has failed to *present* any "special and important reasons" of the character which will move the Court to grant certiorari to review the decision of a lower court. Respondent will further show in the following part of his Argument that no such reasons actually *exist*. This portion of the Argument will review as briefly as possible the decision of the Court of Appeals and the law applicable to the questions presented it, in order to show that its reviewing process and its decision did not fall short of that required by current habeas corpus and other decisions. Petitioner's Questions Presented numbers nine, ten, and eleven have been fully discussed previously and will not again be covered, except insofar as it is necessary to review the merits of the claims of constitutional violations to which they refer and to make clear what petitioner has made confusing.

(1) *The decision of the Court of Appeals held and held only that with respect to all of the issues discussed in its opinion, except the issue of the lie detector evidence, the facts of this case did not justify the District Court in presuming violations of petitioner's constitutional rights to a fair trial without a showing of identifiable prejudice and that with respect to the issue of the lie detector evidence, its admission was of the character of a non-constitutional error, cognizable as error only on appeal.*

Respondent submits that petitioner has failed to comprehend, for the most part, the true holding of the Court of Appeals. The following quotations are statements of the Court of Appeals taken from its opinion and are presented in the order in which they appear in the opinion. Further, all italicized portions are by the respondent.

"Before examining in detail the nature of the publicity given Dr. Sheppard's case, it is well to note that *he must carry the burden of demonstrating* the constitutional vice in his conviction." (Rs. 8)

"In determining whether Dr. Sheppard *has carried the burden of demonstrating* the unconstitutionality of his trial, surrounded as it was by pervasive publicity, it is our duty to review independently this voir dire examination. . . ." (Rs. 11)

"Our negative holding that Dr. *Sheppard has not demonstrated an adequate basis* in the pre-trial publicity for disregarding the juror's assertions of impartiality would be sufficient to dispose of this aspect of his petition." (Rs. 24)

". . . but with the single exception of the Winchell broadcast noted below *there is no specific showing* that any of the jurors had any *contact* with the trial publicity." (Rs. 26)

"In view of the presumption that such instructions were obeyed, we must hold that *petitioner has failed to*

carry the burden of demonstrating a denial of due process in the trial publicity." (Rs. 30)

"*We hold* that petitioner failed to meet his burden of proving that the pretrail and trial publicity discussed above denied him due process of law or its equal protection." (Rs. 34)

"Accepting his [District Judge] finding that Judge Blythin [trial judge] in fact made the statements attributed to him, *we are not persuaded that petitioner has met his burden of proving* deprivation of his constitutional rights in this regard. *Absent some proof that an early impression of petitioner's guilt so infected Judge Blythin's judicial disposition as to impair his ability to provide petitioner a fair trial, we cannot join in the holding of the District Court.*" (Rs. 39)

"The showing that communications were had with the jurors, accordingly, is not of itself enough to demonstrate a denial of due process. . . . Here there is no pretense at showing that prejudicial statements were made to the jurors. . . . In view of *the absence of any attempt to demonstrate or even claim* such violations here, we are satisfied that the Ohio Supreme Court correctly disposed of this issue. . . . *Dispensing* with the requirement that improper communications be shown in such a situation *cannot be related to the present situation,* where we are shown only that some members of the jury made brief telephone calls to members of their families. . . ." (Rs. 44 & 45)

Respondent has alluded to other statements in the opinion of the court below which indicate what the majority considered the basis of its opinion.[20] And lastly, in denying the petition for rehearing the majority again reiterated the basis of their decision saying:

"This Court's majority holding was bottomed upon the conclusion that the petitioner had failed to meet his burden of proving 'not as a matter of speculation but

[20] See part II.B. (4) of respondent's Argument.

as a demonstrable reality' that upon his trial he was deprived of federally granted constitutional rights." (Rs. 112)

It is obvious from the foregoing quotations, the Court of Appeals applied, and rightly so, the rule announced by this Court in *Stroble v. California, supra.* The question before the Court in *Stroble* was whether or not the newspaper publicity aroused such prejudice in the community that the defendant's trial was " 'fatally infected' with an absence of 'that fundamental fairness essential to the very concept of justice.' *Lisenba v. California,* 314 U.S. 219, 236, 86 L.Ed. 166, 180, 62 S. Ct. 280 (1941)" *Stroble v. California, supra,* 191-192. The Court agreed with the California Supreme Court in finding that defendant had failed to show the newspaper publicity had so infected his trial by arousing prejudice against him in the community that he was denied a constitutionally fair trial. The rule announced was as follows:

> "He asks this Court simply to read those stories and then declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, . . . *there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury." Stroble v. California, supra,* 195.

Then the Court in *Stroble* set forth thereafter the following quotations from *Adams v. United States ex rel. McCann,* 317 U.S. 269, 87 L.Ed. 268, 63 S.Ct. 236 (1942)

> "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Adams v. United States ex rel. McCann, supra,* 281.

The last quotation is the esesnce of the rule of law upon which the Court of Appeals has based its decision and the reason for which it reversed the decision of the District Court.[21] Before looking at why the Court of Appeals applied this general rule of law, it is necessary to contrast the basis of its decision with the reasons upon which the District Court bottomed its decision.

(2) *The District Court held that in its view, the facts presented such untoward circumstances surrounding petitioner's trial as to be inherently bad, and prejudice to the petitioner could thereby be presumed without requiring a showing of identifiable prejudice.*

Feeling that the "circumstances are unusually compelling" (Ra. 439a) the District Court asserted that the present case was "analagous to *Rideau*" (Ra. 443a).[22] And the District Court held:

> "... the prejudicial effect of the newspaper publicity was so manifest that no jury could have been seated at that particular time in Cleveland which would have been fair and impartial regardless of their assurances or the admonitions and instructions of the trial judge." (Ra. 444a, Emphasis Added)

and,

> "This court holds that there was such a plethora of prejudicial material contained in the newspapers that no admonition or charge of the court could vitiate the effect of the publicity." (Ra. 450a)

and, speaking of the alleged bias of the trial judge,

> "... this Court can come to no conclusion but that the presumption of the trial judge's impartiality was

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[21] This is not applicable to the Court of Appeals' decision relative to the lie detector issue which will be discussed below at II.B.(3).

[22] *Rideau v. Louisiana*, 373 U.S. 723, 10 L.Ed. 2d 663, 83 S. Ct. 1417 (1963).

> removed and in its place there arose a *presumption* that he was prejudiced against petitioner." (Ra. 460a, Emphasis Added)

And regarding the telephone calls made by jurors,

> "There is nothing in the record *to show the harmlessness* of that part of the telephone conversations which the bailiffs could not hear." (Ra. 474a, Emphasis Added)

In reviewing the decision of the District Court against the background of the record before both the District Court and the Court of Appeals, the latter characterized the former's decision as follows:

> "Before detailed discussion of the issues before us, it should be preliminarily observed that *Dr. Sheppard was released not because of any evidentiary showing* that the jury was prejudiced by the newspaper and other publicity *or that the trial judge exhibited* partiality or prejudice in his conduct of the trial, nor because any evidence that the jurors calls to their homes contained any improprieties. *The District Judge presumed* that the judge and jury *must have been* so affected by the publicity and other events as to be unable to discharge their respective responsibilities in keeping with constitutional standards." (Ra. 3, Emphasis Added)

It is evident from the foregoing that the District Court bottomed its decision upon an exception to the general rule applied by the Court of Appeals. This exception was announced and applied in *In Re Murchison, supra.* The proposition employed is to the effect that when there exists such untoward circumstances surrounding a trial involving such a probability that prejudice will result, the trial may be deemed inherently lacking in due process without a showing of identifiable prejudice to the accused.

(3) *What considerations govern the determination to apply the general rule or the exception to the general rule discussed in II.B. (1) and II.B. (2) above respectively?*

The same evidence and stipulated facts were before both courts below, yet each applied different rules. The question thus presented is; When is a court justified in applying the exception to the rule as did the District Court, and when is a court obliged to apply the general rule exemplified in the decision below? The most recent case of *Estes v. Texas, supra,* placed squarely before the Court the necessity to determine the answer to this qustion. Although the *Estes* case is inapposite to the present upon its facts, it does bring into focus the considerations upon which the determination to apply the rule or the exception to the rule must rest. The following is in *pertinent part,* the Court's discussion thereon.

> ". . . It is true that *in most cases* involving claims of due process deprivations *we require a showing of identifiable prejudice* to the accused. Nevertheless, *at times a procedure employed by the State involves such a probability that prejudice will result* that it is *deemed inherently lacking in due process.* Such a case was *In Re Murchison,* . . . . (Emphasis Added)
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> "This rule was followed in *Rideau* [*v. Louisiana*] *supra,* and in *Turner v. Louisiana,* 379 U.S. 466 (1965). In each of these cases the Court departed from the approach it charted in *Stroble v. California,* [*supra*], . . . and in *Irvin v. Dowd,* 366 U.S. 717 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in *Gideon v. Wainwright,* 372 U. S. 335 (1963) and

White v. Maryland, 373 U.S. 59 (1963) we applied the same rule, although in different contexts.

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"In *Turner* . . . [n] o prejudice was shown but the *circumstances were* held to be *inherently suspect*, and therefore such a showing was not held to be a requisite to reversal. . . . This was found true in *In Re Murchison, Tumey, Rideau*, and *Turner*. Such *untoward circumstances* as were found in those cases are inherently bad and prejudice to the accused was presumed." (Emphasis Added) *Estes v. Texas, supra*, 33 U.S. L. Week 4546 (June 7, 1965)

Resolution of the issue of whether or not the accused was denied his constitutional right to a fair trial must, of necessity, turn on the special facts of each case. That proposition is implicit in the preceding discussion of the rule and its exception taken from the *Estes* case, *supra*. Recognizing the existence of the general rule applied in most cases, the Court points out that when the special facts of the case present "such untoward circumstances", application of the exception to the rule is justified. "Such untoward circumstances" as were found in the facts of *In Re Murchison, Tumey, Rideau, Turner, White*, and *Gideon*[23] were deemed by this Court to be inherently suspect and infused with such a probability of prejudice, that the accused was relieved of the burden of showing instances of identifiable prejudice. Thus has the Court furnished standards of measurement by which all courts may determine when a case presents circumstances justifying the use of the exception to the general rule. After such a determination, a presumption of prejudice may be indulged without requiring an

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[23] *In Re Murchison, supra*; *Tumey v. Ohio*, 273 U.S. 510, 71 L.Ed. 749 (1927); *Rideau v. Louisiana, supra*; *Turner v. Louisiana, supra*; *White v. Maryland, supra*, and *Gideon v. Wainwright, supra*, respectively.

evidentiary showing thereof as required by the general rule.

(4) *The Court of Appeals correctly considered all of the evidence before both courts below and correctly determined therefrom that the circumstances surrounding petitioner's trial were not so untoward as to be inherently suspect and liable to a presumption of prejudice.*

The District Court evidently viewed its findings of fact as presenting "such untoward circumstances" in comparison with *Rideau, supra,* and for that reason presumed that petitioner's trial was unconstitutionally invaded by prejudice denying him of his federally granted right to a fair trial. The Court of Appeals held that should the District Court's ultimate conclusions be viewed as findings of fact, they were clearly erroneous.[24]

Pretrial publicity: The Court of Appeals began its opinion with a reference to the general rule requiring that petitioner show as a demonstrable reality the identifiable prejudice he alleged constituted the denial of his constitutional rights.[25] The court below then set out to examine the voir dire record[26] as this Court did in *Irvin v. Dowd, supra,* 723. They found *no* evidence of prejudice.[27] Following this the court reviewed the pretrial publicity[28] pointing out specific instances which show that the publicity was by no means entirely lopsided against petitioner or was of a nature comparable with that in *Rideau,* and *Irvin, supra.*[29] The District Court relied heavily on the *Rideau* and *Irvin*

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[24] Rs. 113
[25] Rs. 8
[26] Rs. 11-12
[27] Rs. 12
[28] Rs. 13-16
[29] Rs. 13-23

cases as support for its position. The Court of Appeals went to some length to show the facts of the Sheppard trial in no way paralleled or in any way measured up to the special facts of those two cases,[30] or any other case cited by the District Court.[31] It concluded that facts in the Sheppard trial did not present "such untoward circumstances" as to take it out from under the application of the general rule and place it within the scope of the exception.[32] However, the court below was not satisfied with merely a negative holding against the decision of the District Court, although such was a sufficiently adequate basis for reversal.[33] Instead, the Court of Appeals went further to show "the affirmative reasons for refusing to ignore those assertions." (petitioner's assertions of constitutional vice in his trial)[34] *It should be noted here that the dissenting judge below concurred in the holding of the majority on the issue of pretrial publicity.*[35] He said:

> "I also agree with my brothers that the clamorous and frequently abusive publicity prior to trial, plus the trial judge's denial of change of venue, probably did not, of themselves, rise to the level of constitutional violations."[36]

Trial publicity: The Sixth Circuit then turned to a review of the District Court's decision on the question of prejudicial trial publicity[37] pointing out that no contention was made that the newspaper accounts of the trial were

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[30] Rs. 16-23
[31] Rs. 21-23
[32] *"Beck v. Washington*, 369 U.S. 541, 557, 8 L.Ed. 2d 98, 82 S. Ct. 955 1962)" (Rs. 23)
[33] Rs. 24
[34] Rs. 24-25
[35] Rs. 92
[36] *Ibid.*
[37] Rs. 25

substantially inaccurate.[38] The Court of Appeals found the following facts: (1) that there was not the first indication of jurors having contact with the trial publicity contained in the evidence before the courts below,[39] (2) that the trial judge thoroughly and continuously from the beginning to the end of the trial reminded the jurors of their duty and responsibility to remain fair and impartial, to disregard everything that did not transpire in court, and to avoid contact with publicity concerning the trial,[40] (3) that trial counsel for petitioner never expressed dissatisfaction with such instructions,[41] (4) that the law presumes "the jury to have obeyed their instructions to avoid all contact with publicity concerning the case before them until *some* contrary showing has been made.",[42] (5) that no such showing was made,[43] (6) that jurors were interrogated with respect to two radio broadcasts, all denied any prejudice therefrom against petitioner, and were duly instructed to forget the broadcast,[44] and (7) that trial counsel for petitioner had an opportunity to interrogate the jurors on their motion for a new trial because of trial publicity and failed to do so.[45] The court finally concluded that the most they could do would be to guess whether or not the jurors violated their oaths and that such was not sufficient to rebut the presumption of their fidelity to the duties and responsibilities imposed upon them by that oath.[46] Further, the Court of Appeals could not find the trial judge to be prejudiced due

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[38] *Ibid.*
[39] Rs. 26
[40] Rs. 26-27
[41] Rs. 28
[42] Rs. 29
[43] Rs. 30
[44] Rs. 29-30
[45] Rs. 30
[46] *Ibid.*

to publicity on the "basis of a trial record entirely devoid of any evidence of trial misconduct on his part."[47]

Biased trial judge: The next alleged violation of petitioner's constitutional right to a fair trial considered by the Court of Appeals consisted of an allegation that the trial judge was prejudiced against petitioner. Petitioner based this charge upon two statements. One was an unsworn statement by Dorothy Kilgallen Kollmar and the other was made by an employee in the office of the Clerk of the Court of Common Pleas of Cuyahoga County, Ohio, at the time of the Sheppard Trial.[48] The Court of Appeals found (1) that the District Judge erred in considering both statements to have the strength of "uncontroverted evidence"[49] and (2) that there was sufficient evidence to contradict these statements.[50] The court cited numerous instances thereof[51] which were a matter of permanent record made at the time of Sheppard's trial as opposed to recollections of memory ten years old. Specific discussion was made of the fact that petitioner's trial counsel himself felt sure that the trial judge was completely impartial.[52] The court concluded (without holding as clearly erroneous the District Judge's finding of fact)[53] that "petitioner failed to sustain his burden of proving deprivation of his constitutional rights in this regard."[54] in view of the presumption of regularity in the trial judge's conduct of the trial. *The dissenting judge in the Court of Appeals concurred in the result reached by the majority on this issue.*[55] The court then, as

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[47] Rs. 32
[48] Rs. 35
[49] Rs. 35-36
[50] Rs. 36
[51] Rs. 36-38
[52] Rs. 38
[53] Rs. 39
[54] *Ibid.*
[55] Rs. 92

it did in regard to the issue of pretrial publicity, went further to review the law on this subject to show that the most important cases dealing with an unconstitutionally biased judge presiding at an accused's trial were completely inapposite to the Sheppard trial.[56]

The issue of the lie detector evidence: Petitioner's complaint of constitutional vice in his trial with respect to lie detector evidence relates to the fact that the press made frequent reference to petitioner's refusal to take a lie detector test including the reasons given by him for refusing and the fact that police officers testified at trial to his refusal to submit to a lie detector test.[57] Although petitioner's trial counsel objected to introduction of testimony relating that Bay Village, Ohio Mayor Houk took a lie detector test, petitioner's trial counsel failed to object to the introduction of testimony that petitioner had refused to do so.[58] On the contrary, such refusal was freely discussed on direct, cross, redirect, and recross examination without objection, testified to by petitioner himself, and alluded to by both prosecution and defense counsel in closing argument.[59] Defense counsel requested an instruction to the jury that petitioner was not required to take a lie detector test and that the results of such tests were inadmissible in court.[60] The trial judge instructed the jury[61] that petitioner was not required to take a lie detector test. The Court of Appeals duly noted that neither the District Judge nor petitioner have alluded to any decisions ruling unconstitutional the admission of testimony, freely corroborated by the accused himself, that a defendant has refused to take a lie detector test. Following

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[56] Rs. 43
[57] *Ibid.*
[58] *Ibid.*
[59] Rs. 45-46
[60] *Ibid.*
[61] Rs. 45

this the opinion of the court below cites cases it deems appropriate.[62] Without determining the specific constitutional question posed by petitioner,[63] the Court of Appeals held that admission of the evidence in question did not constitute error of a constitutional dimension in petitioner's trial.[64] "If there was fault in what occurred, it was non-constitutional error which should have been assigned on appeal. Habeas corpus is not to be employed as a substitute for appeal."[65] The court bottomed its holding on this question on the facts that defense counsel deliberately withheld objections to the introduction of this evidence, that no motion to strike the pre-objection evidence was made, that no written instructions thereon were ever proffered, and that no error was ever assigned on appeal.[66]

The issue relating to telephone calls made by jurors to members of their family during the jury's deliberations: The stipulated facts of this issue are set forth in the opinion of the court below[67] as well as testimony[68] taken of the bailiff in charge of the jury members when sequestered for deliberation. The Supreme Court of Ohio failed to find reversible error.[69] The Court of Appeals felt that the District Judge "place[d] reliance on cases the facts of which disclose their lack of resemblance to the case before him and us."[70] and then proceeded to discuss the cases involved at some length[71] including the very recent case of *Turner* v. *Louisiana*, *supra*. Further, the Court of Appeals pointed

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[62] Rs. 48
[63] *Ibid.*
[64] *Ibid.*
[65] *Ibid.*
[66] Rs. 47
[67] Rs. 50
[68] Rs. 51
[69] *Ibid.*
[70] Rs. 52
[71] Rs. 53-56

out that *there was no evidence* of any impropriety in the communications and held that in view of this fact and the presumption "that the jurors remained true to their instructions"[72] the situation could not be related to that set of facts found in *Turner* v. *Louisiana, supra,* so that the deprivation of constitutionally granted and protected rights could be presumed.

Argument of the remaining issues i.e. review of other claimed constitutional violations, sufficiency of the evidence, and the cumulative effect of the alleged constitutional violations has been thoroughly presented in parts II.A. (2), II.A. (3), and II.A. (4), respectively, and respondent will not belabor them here. Respondent realizes that he has presented a rather extended outline of the opinion of the Court of Appeals and that such is somewhat atypical of an argument. However, the only reason of any significance relied on by petitioner, slight as it may be, for justifying his petition to the Court to grant certiorari, is that the reviewing process of the Court of Appeals fell short of that required by current habeas corpus decisions. The foregoing part of II.B. (4) is a forthrightly stated condensation (albeit lengthy) of the opinion of the Court of Appeals, presented without embellishment or misleading statements. Merely standing by itself the above outline clearly shows that the review afforded this case by the Court of Appeals was nothing less than an inspiring example of the seriousness, conscientiousness, and professional thoroughness which makes our system of jurisprudence indispensible to the continued existence of a nation of free men. But of more immediate importance is that the foregoing clearly undermines petitioner's unfounded and unsupported allegation that the Court of Appeals failed to decide this case

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[72] Rs. 55

properly. On the contrary, it shows that the Court of Appeals had a firm grasp, not only of the facts in petitioner's favor but of *all* the facts, that it compared these facts to the special facts of pertinent cases decided by this Court and other courts of appeal, that it *demonstrated* that the facts present in this case did not amount to "such untoward circumstances" as to justify a presumption of prejudice to the petitioner during his trial, and then that it proceeded to apply the law to the facts of the case in strict conformity with the applicable decisions of this Court.

CONCLUSION

The crucial difference between the decision of the District Court and that of the Court of Appeals is in each court's appraisal of the facts. Respondent contends that the Court of Appeals presents the far more correct view of the facts of the Sheppard trial than did the District Court. The latter's view of the facts is clearly erroneous. Nevertheless, even if one could not say that the District Court was clearly erroneous in its finding of facts or assessment of the circumstances surrounding the Sheppard trial, there would still be no "special and important reasons" for the Court to grant certiorari. In *Rogers v. Missouri Pacific R. R. Co.*, 352 U.S. 521, 1 L. Ed. 2d 515, 77 S. Ct. 461 (1957) the dissenting[73] Justice stated at page 351-352:

> "The course of argument and the briefs on the merits may disclose that a case appearing on the surface to warrant a writ of certiorari does not warrant it . . . or may reveal more clearly that the only thing in controversy is an appraisal of facts on which this Court is being asked to make a second guess, to substitute its assessment of the testimony for that of the court below."

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[73] The controversy in the differing opinions in this case did not go to the matter quoted.

At page 356 of the same case the same Justice makes clear that the Court does not accept cases on certiorari to review evidence. It is for this reason among others that Respondent maintains that certiorari should not be granted. This brief attempts to make clear that, although this case may appear on the surface to warrant a writ of certiorari, the only thing in controversy is an appraisal of the facts. The Court should not be asked to second guess and does not sit to substitute its assessment of the testimony for that of the Court of Appeals.

Petitioner has failed in all respects to present "special and important reasons" why this Court should grant a writ of certiorari to the United States Court of Appeals to review their decision in this case. He nowhere cites a decision of another court of appeals on the same matter with which the decision of the Sixth Circuit is in conflict. As noted previously, "The facts of this case do not add up to any of the situations in which the Supreme Court of the United States or any United States Court of Appeals has found it appropriate to strike down a judgment affirmed by the highest court of a state."[74] The Court of Appeals has not decided an important state or territorial question let alone in a way in conflict with applicable state or territorial law. It has decided a question of federal law which is always important both to the individual and the state, but petitioner has not indicated any question of federal law presented in this case which has not been decided by this Court. There simply is no important federal question presented here not previously decided by the Court. The decisions of the Court which are pertinent to the questions presented here, some of which are landmarks of the law

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and some new, provide unequivocal direction for the manner in which this case should and was in fact decided.

Merely a superficial reading of the Court of Appeals' opinion will make patently clear that it did anything but depart from the accepted and usual course of judicial proceedings and it certainly did not sanction such a departure by a lower court.

Respondent is moved to urge once more that Samuel H. Sheppard's petition for writ of certiorari should be denied as improvident. A statement made by the Court of Appeals in concluding its discussion of the issue relating to the lie detector evidence is most appropriate at this point with respect to, not only that one issue, but to the original trial and all of the numerous judicial proceedings in the ten years since his conviction which have been concerned with affording petitioner a full and fair review of his trial and the adjudication of his constitutional rights.

> "As proud as we are of the great traditions of our courts and their concern for the rights of those accused of crime, we are aware that like all human institutions they seldom act with perfection. It is not difficult, after ten years of searching analysis and contemplative study and the announcement of some new judicial attitudes, to find some imperfections in the conduct of a trial and to conclude that a judge or any attorney could have done a better job. But stability of the law and a nation's respect for its courts will disappear if, long after the event, their judgment may be set aside because a trial judge's discretion was less than perfectly exercised or because it is thought that the trial plan of the defense counsel was not the best that could have been employed. This must be especially true where an accused has enjoyed adequate and full opportunity for appellate review." [75]

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The petition for writ of certiorari to the United Siates Court of Appeals for the Sixth Circuit should be denied and the Court is hereby respectfully urged to deny said petition.

Respectfully submitted,

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